No. 11708

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

vs.

FRANCIS C. BOWDEN, JOHN E. HOEKZEMA, EDWARD G. BARBER, L. McGEE, CHRIS POULSON, FRED MAYER, DR. F. N. (Doc) DORSEY, ROBERT (Bob) BAKER, AND ANTON ANDERSON, APPELLEES

ON APPEAL FROM THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, THIRD DIVISION

BRIEF FOR APPELLEES

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Attorney for Appellees.

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JURISDICTION

The Appellees concede that the Third District Court, Third Division, Territory of Alaska, had jurisdiction in this proceeding by virtue of the provisions of Chapter 103, Compiled Laws of Alaska, 1933, entitled "Actions to Avoid Charters and to Prevent the Usurpation of Office or Franchise and to Determine the Rights Thereto" and by virtue of Section 4 of the Act of June 6, 1900, Ch. 786, 31 Stat. 322, as amended (48 USCA 101).

STATEMENT OF CASE

Appellant at the conclusion of its Statement of Facts, (B-9), asserts that there is but one question before the Court, namely, whether Ordinance No. 51 (R-11) is inconsistent with the provisions of the Act of March 3, 1927, C. 363, Sec. 7, 44 Stat. 1394 (48 U.S.C.A. 57) which prescribes the qualifications of persons entitled to vote at municipal elections in the Territory of Alaska.

Appellees, in their motion to Quash, (R-17) challenged not only the validity of Ordinance No. 51, when construed as contended by Appellant, but also the sufficiency of Appellant's complaint. Both contentions were addressed to the discretion of the Court. The Appellees, in argument, will discuss the constitutionality of Ordinance No. 51, but such argument should be considered by this Court in the light the general rules applicable to Quo Warranto proceedings.

The Appellant, in its assignment of Errors (R-23-24), assigns five grounds of error involved in the decision of the Hon. Judge Joseph W. Kehoe. These assignments of error are adopted by the Appellant in its Notice of Points To Be Relied Upon, Upon Appeal, (R-48-49). All assignments are predicated upon the general objection that the decision of dismissal was contrary to law.

Argued to the Court, but not mentioned in Appellant's statement of fact, was a circumstance significant in this controversy. On the 29th day of March, 1947, a special election was held in the City of Anchorage, and many electors—not less than 350, voted at such special election. They presumed that such registration qualified them as voters for the general election, which is the subject of this controversy, and such a presumption is supported by the manifest intent of that portion of Section 7, Ordinance 51 (R-11) which states that "nothing in this Ordinance shall be construed so as to require more than one annual registration of voters".

Also important in interpreting Judge Kehoe's decision, is the fact that for approximately fifteen years, non-registered voters were permitted to swear in at the polls and cast their ballots upon subscribing the affidavit form required by Section 23, Ord. 17, (R-38). All non-registered voters, including the number who had voted at the special election a few days before, were required to sign such oath, verifying their qualifications as voters.

Appellant's complaint, Paragraph VII and VIII (R-4-5) is based upon the single allegation of illegality of 653 votes cast by non-registered voters. No fraud, collusion, or other corrupt practices are alleged to have been committed by those 653 voters or

election officials.

Ordinance No. 51 does not expressly repeal Ordinance No. 17, so Appellees contend that the restricted interpretation placed upon Ordinance No. 17 and No. 51 by Appellant would render the latter unconstitutional and that the two ordinances should be construed together.

Appellees also contend that Appellant's complaint (R-2-7), even admitting constitutionality of Ordinance No. 51, as the basis of a satutory proceeding in the nature of common law Quo Warranto did not state facts sufficient to constitute a cause of action when addressed, as it necessarily was, to the sound discretion of the Court.

ARGUMENT

Appellee's argument, challenging the validity of Ordinance No. 51 is predicated upon the wording of the Act of March 3, 1927 C-363, Section 7, 44 Stat. 1394 (48 U.S.C.A. 57), which section is as follows:

> "All citizens of the United States, twenty-one years of age and over, who are actual and bona-fide residents of Alaska and who have been such residents continuously during the entire year immediately preceding the election and who have been such residents continuously for thirty days next preceding the election in the

> precinct in which they vote, and who are able to read and write in the English language as prescribed and provided by Section 51, of this title, and who are not barred from voting by any other provision of law, shall be qualified to vote at any of the elections mentioned in said Section 51".

Counsel for Appellant, on pages 16-18, of his brief, has set forth excerpts from the Congressional Record pertaining to debate of various provisions of the above act, and urges that such excerpts indicate an intention upon the part of Congress to permit the enactment of registration statutes. What Congress intended, and what it actually accomplished by such act should not be confused in order to justify Appellant's contentions.

Specific authority to enact a registration statute should have been delegated directly by Congress as was done for the Territory of Hawaii. There, Congress legislated upon the subject of registration as follows:

> "Section 617, Right to Vote; qualifications of electors. In order to be qualified to vote for representatives a person shall — Fourth: Prior to each regular election, **during the time prescribed by law for registration,** have caused his name to be entered on the register of voters

> for representatives of his district. Act April 30, 1900, C. 339, 31 Stat. 151, (48 U.S.C.A. 617)."

If the adoption of a registration statute were proper for Hawaii, a similar one would seem necessary for Alaska.

Counsel for Appellant (B-11-12), also argues that "the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and **laws of the United States . . .**".

That elections are rightful subjects of legislation in Alaska would be denied by only the most corrupt politicians; however, merely because elections are rightful subjects it does not follow of necessity that either the Territory or a municipality may, for regulatory purposes, exceed the authority delegated by Congress. To argue, as the Appellant does, that registration is not a qualification but instead a regulation of the franchise, is but an evasion of the fundamental distinction between the constitutional theories of State and Territorial governments. The fundamental distinction which is universally recognized is ably set forth in the following cases:

In Juneau Hardware Co. vs Troy, 6 Alaska 364, the District Court reasoned as follows:

> "When Alaska became incorporated in the U.S., it became a part thereof, it is true, but never-

theless, it sustained a different relation to the whole U. S. from that which the States themselves occupied. . . . "

" . . . Alaska has indeed been incorporated in, and is a part of, the U. S. and the constitution is in full force here, Rasmussen vs U.S. (197 U.S. 526, 49 L. Ed. 862) but that fact does not change Alaska from being a Territory into a State, nor render applicable to Alaska those provisions of the constitution which have to do only with the States . . . . ".

In the syllabus, the Court further stated:

" . . . and it is governed by Congress by virtue of that clause of the constitution which provides that Congress has power 'to dispose of and make all needful rules and regulations respecting the Territory or other property of the U.S.' ".

In Wickersham et al vs Smith et al 7 AL. 522 and 535, we find the following language:

"the United States is subordinate to the laws of the United States and can exercise **only those powers granted.** The grant of legislative power to the Legislature contained in Section 9, of the Organic Act (48 U.S.C.A. Sec. 44, 45, 77-79), extends to all rightful subjects of legislation

not inconsistent with the Constitution and Laws of the United States subject to the specific limitations in Section 1 (48 U.S.C.A. - Sec. 21), and 9 of the Act".

" . . . **a Territory is not like a State in its sovereignty. It possesses only such powers as granted by the Congress of the United States.**"

Appellant argues (B-12), that, since cities are authorized to make provision for municipal elections, the authority to require registration under Ordinance No. 51 follows as a matter of course. This would be true but for the fact that such Ordinance by itself makes no provision for receiving votes of unregistered voters. When Congress has directed that every person possessing certain qualifications shall have the right to vote at any municipal election, may a city, without providing an alternative to prior registration, deny any voter his right? Appellees contend not, because Congress, by statute, has not specifically delegated such authority to the Territory or its municipalities, as was accomplished for the Territory of Hawaii.

The question whether a Territory may act in reference to a subject already legislated upon by Congress is ably discussed in the case of Allen et al vs Reed et al, 60 P 782. There a mandamus action was instituted to compel the county commissioners

to place the name of a certain town upon the ballot for an election submitting to the voters a proposition relating to the selection of a county seat. The Court in determining whether the action was proper, spoke as follows:

> "The determination of this question involves the construction of the Organic Act, the laws of Congress and the statutes of this Territory upon the subject of the location and changing of county seats . . . "

The Court then propounded two questions, the second being:

> "(2) Is it inconsistent with any law of the U. S. upon that subject?"
>
> "It is manifest that, if Chapter 23 of the Stat. of 1893 is not a rightful subject of legislation or is inconstistent with the laws of the U.S., then the power to change the county seat, under and by virtue of said Act of the Territorial Legislature is absolutely void".
>
> "The grant of legislative power to this Territory is vested in Section 6 of the Organic Act, which, among other things, provides 'that the legislative power of the Territory shall extend to all rightful subjects of legislature not inconsistent with the constitution and laws of the U. S."

"That Congress has plenary legislative power over the people of the Territory and all departments of Territorial government is no longer a question open to discussion . . . '".

In other words, the Territories are not organized under the Federal Constitution and derive no part of their legislative or judicial functions from that instrument but they are solely and exclusively the creatures of Congress".

Hence, whenever Congress legislates upon any subject directly in relation to the government of the people of the Territory, then it ceases to be a rightful subject of Territorial of the Territory has enacted or enacts upon legislation, and any law that the legislature the same subject which Congress has assumed to legislate upon is inconsistent with such laws of the U. S. and is therefore, void".

"And it must therefore follow that any act passed by the legislature upon the same subject is suspended and superceded until the law of Congress is modified or repealed; in other words, any law enacted by the inferior body upon the same subject must yield to the superior power".

The court then ruled that the county seat could not be changed and writ of mandamus was denied.

(See also: Baldridge vs Morgan et al 106 - P.392).

In that case Congress, by statute enacted for the Territory, had adopted certain provisions concerning County government. The Territorial legislature later enacted a statute purporting also to regulate county government. The cited case is analagous to this controversy in that here we have an enactment of Congress wherein it is said that certain conditions shall prevail, and a municipal ordinance purporting to restrict such conditions, notwithstanding the absence of restrictions by Congress.

Appellees contend that since Congress enacted a statute embracing the qualifications of voters, neither the Territory nor its municipalities can restrict or deny, the right of franchise, even though the restrictions be for meritorious regulatory purposes.

Upon the authority of the Allen case, supra, it would appear that the provisions of Ordinance No. 51 are superceded by the quoted section of the act of Congress which designates the qualifications of Alaska voters. Whether registration under the ordinance be construed as a qualification or a restriction seems immaterial, for, be it either, a voter may be denied the right which he is guaranteed by Congress. Since Congress, in the exercise of its plenary legislative power, has directed that every person possessing certain qualifications - and registration is

not either a qualification or condition—shall have the right to vote at any municipal election, Ordinance No. 51 is inconsistent therewith for the reason that it imposes a restriction not found in the Congressional Act. The purpose or merit of such a restriction can not serve to sustain it where authority is lacking.

Registration, Appellees contend, would necessarily have to provide an alternative which would permit voters, not registered, to be sworn in at the polls. While Appellants contend that registration acts are universally recognized as constitutional it is significant that in most, if not all, states, registration systems the constitution or statutory law specifically provides alternatives to prior registration. Very few states unconditionally deny the right to vote upon failure to register. Ordinance No. 51, standing alone, contains no alternative and would deprive voters, otherwise qualified, of the right to vote merely because they did not register at the time and in the manner provided by law. Contentions of the Appellees are further supported by the decision of White vs County Commissioners of Multnomah County, 10 Pacific 484. Appellant argues that this case presents the minority view and probably quite rightfully so, speaking numerically; however, the writer believes that this case represents the correct view where neither the constitution nor statuatory

law provide for the registration of voters. There, the Court said:

> "as we construe the constitution, every law that cannot, under the constitution "be taken that shall require previous registration as a prerequisite to the right to vote, is ipso facto void. The legislature would have the power by implication, had it not been specifically conferred, to prescribe the manner of regulating and conducting elections; but the right to vote itself has been placed beyond their interference or control"
>
> "The right to vote under the constitution is a vested constitutional right. 'When I say right is vested, I mean, that he has the power to do certain actions, or to possess a certain thing according to the law of the land. Chase J., Calder vs Bull; 3 Dall 394. If the right still be vested by the constitution it denotes a right that cannot, under the constitution "be taken away." Where a constitution provides, as does that of New York, that laws shall be made for ascertaining by proper proofs the citizens who shall be entitled to the right of sufferage the power to pass a registration law seems fully implied." See U. S. vs Quinn 8 Blatchford 59.

> "The case of State vs Butts 31 Kansas 554, 2 Pacific Reports 618, was founded on a like constitutional clause. **The difference between those cases and the present is the difference between a case where power has been conferred and a case where it has not".**

In all of the cases cited by the Appellant in support of the validity of registration laws, which the writer has read, to use the words of the Oregon Court, **"the power has been conferred."** In this case however, Appellant has failed to cite any provision of statutes emanating from Congress, or even the Territorial legislature, whereby the right to establish a registry system could be reasonably implied, and if we adhere to the fundamental theory of Territorial constitutional law, the power to adopt a registration system does not exist unless Congress has expressly delegated the necessary authority to the Territory or its municipalities.

Thus, so far as this proceeding is concerned there would appear to be considerable doubt regarding the validity of Ordinance No. 51, if construed as Appellant contends it should be.

Even if the constitutionality of Ordinance No. 51 be upheld, Appellant's contentions of error in Judge Kehoe's ruling are not sustainable since this proceeding is statutory and in the nature of a Quo

Warranto action on relation of the government. As was said in Weaver vs Palmer Bros. Co., 3 Federal 2nd - 333 270 U. S. 402 "Every opinion of the Court is to be read with regard to the facts of the case, and the **question actually decided.**" The question actually decided by Judge Kehoe was whether or not this proceeding should be heard to conclusion or dismissed. In the exercise of his discretion he followed the latter course.

The Hon. Judge Kehoe in rendering his decision took into consideration not only the doubtful validity of Ordinance No. 51, but also the manner in which municipal elections had been conducted in Anchorage for many years. Voters who had not complied with the registration provisions of Ordinance No. 51 had been permitted, for approximately fifteen years, to swear in at the polls, thus adopting and giving effect to the provisions of both ordinances. This was a circumstance commonly known to all residents of Anchorage, and, at one time or another, most voters participated in the practice. Records of the City do not indicate whether such procedure arose from dereliction on the part of election officers or from an interpretation of Ordinances No. 17 and No. 51 by City officials. Whatever the source of this procedure, it seems that such practice brings this case within the following rules. In speaking of the construction placed upon a statute by an execu-

tive department, the Court in Bloxham vs Consumers Electric Light and Street R. Co. 36 Florida 519, 18 Southern 444 - 29 LRA 507, spoke as follows:

> "The construction placed by an executive department upon a statute affecting the performance of its duties is not lightly to be questioned, especially when it has become established by long usage and relates to matters of form only. But practical construction must not be allowed to defeat the manifest purpose of the statute".
>
> "When in the performance of executive duties, it becomes necessary for the executive department to construe a statute, great deference is always due to its judgement; and the obligation is increased by the lapse of considerable time before its acts are called in question".
>
> "In such a case we think the greatest deference and respect should be paid by this court to the long prevailing construction of the statute made by the executive department of the State government, and we will not interfere with the same".

This rule of long standing has also been adopted by the United States Supreme Court in Brown vs U. S. - 113 U.S. 568:

'In the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect. The construction given to a statute by those charged with the duty of executing it ought not to be overruled without cogent reasons." Ahtens vs Disintegrating Co. 18 Wall 272, 301 - United States vs Pugh, 99 U.S. 265.

In U. S. vs George McDaniel - 32 U.S. 1, the United States Supreme Court said:

"Usage cannot alter the law, but it is evidence of the construction of it; and must be considered binding as to past transactions".

That Judge Kehoe, in considering the allegations of Appellant's complaint properly exercised his judicial knowledge and applied the doctrine of judicial notice, is further supported by the following case:

Greeson et al vs Imperial Irrigation District et al 55 F2 321. "Judicial knowledge should be utilized by the Court as an aid to the proper interpretation of the bill of the complaint and as to the sufficiency of the allegations of fact".

(See Jackson vs U.S. 230 U.S. 18, 57L Ed 1363)

> "An analysis and consideration of the allegations of the complaint, aided by facts which this court judicially knows, **and which it has a right to consider in determining the sufficiency of the complaint under the decision of of the United States Supreme Court in Arizona vs California,** 283 U. S. 423, 75 L. Ed 1154, fails to sustain Plaintiff's contentions."

Judge Kehoe, as a long time resident of the Third Division, and for many years a resident of Anchorage was familiar with the practice and election procedure in the City of Anchorage, and on the authority of the above cited cases, his consideration of a construction which had long been applied to the interpretation of the Ordinances No. 17 and 51 was entirely proper. These facts which were judicially known to the court were important in determining what the exercise of his discretion would be in rendering a decision.

Appellees further contend that the election which is attacked in this proceeding was not void because of the improper observance of the provisions of Ordinance No. 51. As has been said by several courts, there is a marked distinction between registration, though it be not entirely in harmony with the letter of the law, and no registration at all. In the case of Smith vs Board of Commissioners, Skagit County,

45 Federal 725, where there was no registration at all, we find the following statement:

> "Where the registration law has been disregarded, as it plainly has in this case, the election is an absolute nullity." The Court in adopting the foregoing rule quoted from McCrary the following:
>
> "It being conceded that the power to enact a registry law is within the power to regulate the exercise of the franchise and preserve the purity of the ballot, it follows that an election held in disregard of the provisions of a registry law must be held void." McCrary, Elect. (3rd Ed.) Sec. 100.

This rule was also adopted in the case of Fish et al vs Kugel et al, 165 P. 299. In both of the foregoing cases, there was an entire absence of registration not withstanding statutes requiring registration of all voters. In this proceeding there was no **complete lack of** registration and significantly there is no charge that persons not otherwise qualified voted at said election. Since there was registration part of which was in strict compliance with Ordinance No. 51 and part of which was permitted under provisions of Ordinance No. 17, this case is not within the rule of the foregoing cases.

Further consideration of Ordinance No. 51 re-

veals another uncertainty regarding the real intent of the Council that adopted it. Section 1 of the Ordinance (R 7-8) provides: ". . . . **and no persons shall be entitled to vote at any municipal election who are not registered according to the provisions of** this Ordinance. . . . ." Except for this declaration, the Ordinance is silent upon how the court shall consider votes cast by non-registered voters. Appellant argues that the votes are ipso facto illegal and the election void. Such reasoning, almost without exception, has been discarded even in jurisdictions where registration laws are construed as mandatory. Courts appear to have universally adopted a rule that elections wherein registration irregularities have occurred, will be sustained either upon the theory that election law provisions are directory when litigated after an election, or that errors upon the part of election officials, will not be allowed to void an election.

In speaking of an election where the ballots of twenty-two (22) unregistered voters had been counted, the Court in the case of Milton Cameron, Appellant, vs Dano Babcock respondant, 262 NW 80, 101 A.L.R. 650, accepted the following rule:

> 'The statute goes only to the extent of saying **"that no vote shall be received"**; it does not declare that after a vote has been received it shall be an illegal vote for failure to comply

therewith. We believe the rule announced by the Indiana Court in the case of Jones vs. State ex rel Wilson, 153 Ind. 44, 55 N.E., 229, 233, is sound wherein that Court said:

"All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void".

Numerous jurisdictions have adopted the same rule where the acceptance of contested votes was attributed to the errors of election officials. If the acceptance of votes cast by voters not registered in strict compliance with Ordinance No. 51, be considered a dereliction upon the part of such officials, the case is brought within the rules layed down by the following cases:

In Thompson vs Chapin, 209 P. 1060, the court ruled:

"Statutes tending to limit a citizen in the exercise of the right to vote should be liberally construed in his favour, and exceptions which exclude a ballot should be restricted, rather than extended, so as to admit the ballot if the spirit and intention of the law is not violated, although a liberal construction would violate it. The result, as shown by the ballots deposited by legal electors, must not be aside, except for causes plainly within the purview of the statute. . . The departure from the law in matters which the legislature has not declared of vital importance, must be substantial in order to violate the ballots. This appears to be the general current of all the authorities. In Bowers vs Smith, 111 So. 61, 20 SW 101, it is said: **"If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor, as best they may discern whether the deviation from the prescribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will."**

"The general rule layed down by this court which appears to be universally recognized is that the right of our citizens to vote at an elec-

> tion cannot be defeated **because** of the failure of election officials to perform an administrative duty in the conduct of the election, specifically imposed upon such officials."

The case of: State of South Carolina ex rel. Birchmore vs State Board of Canvassers 59 S.E. 145, 14 L.R.A. (N.S.) 850, adopted the same rule in the following language:

> "The universal weight of authority is to the effect that where the result of an election is not made doubtful, nor changed, irregularity or illegalities, in absence of fraud, will not cause the expressed will of the body of voters to be set aside, unless a constitutional provision is violated or **it is specifically provided by legislative enactment that such irregularty or illegality shall invalidate the election.**"
>
> "The general principles to be drawn from the authorities are that honest mistake, or mere omissions, on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid the election, unless they affect the result, or at least render it uncertain." Election upheld.

Another case: Tagwell vs Davis - 130 P. 400, adopts the same view:

"The main purpose of the law is to prevent persons who are not qualified electors from exercising the right of suffrage. It is not the purpose of the law that a large number of qualified electors who have cast their ballots, which have been received and counted by the election judges, should be disfranchised on account of the judges of election not following the correct procedure of the law has been attained **and only qualified electors have been allowed to cast their ballots.**"

The foregoing rules are also recognized by the following cases:

Lehlback vs Haynes, 54 N.J. Law 77, 23 Atl. 422.

In re West Mahonoy Township contested election, 101 A 946.

Krickbaum's contested election, 70 Atl. 852.

State vs Arnold, 213 S.W. 834.

State ex rel Harry et al vs Ice, et al, 191 N.E. 155.

Hogins vs Bullock, 121 S.W. 1065

Jones vs State, 55 N.E. 229.

Miller vs Pennoyer, et al, 31 P. 830.

Stackpole vs. Hallahan, 37 P. 16, 19.

Lamb vs. Palmer, County Treasurer, 191 P.

184, 186.

Appellant probably will argue that the rules adopted by the foregoing cases should not be applied in this case because in the Anchorage election there was the equivalent of a complete disregard of Ordinance No. 51. Such argument would be solicitous rather than persuasive. Appellant likely will also contend that even those who voted at the special election had no right to vote at the general election unless registered. Such reasoning would not be consistent with the provisions of the ordinance sought to be sustained. Appellees have stated the approximate number of those who cast votes at both elections for the purpose of illuminating the reasons behind Judge Kehoe's decision. Technical illegality of votes is always reviewed reluctantly by Courts, and generally adversely to Appellant, unless there is a mandate in the law that violation of any provision shall render an election void. There is no such mandate in Ordinance No. 51.

Furthermore, there is no allegation that the unregistered voters were not qualified electors. The lack of such allegations would indicate all were qualified, or at least, that the number not qualified was so small that the election outcome would not have been rendered doubtful by the acceptance of their votes.

Nor does the complaint charge fraud, coercion,

intimidation or other corrupt practices upon the part of the voters or the election officials. Appellant's failure to interject issues, other than the technical legality of such votes, would render more appropriate the application of the above rules.

Appellee's objections, raised by their motion to quash, were presented in such manner because of the nature of this proceeding and of the relief sought. It is generally recognized that statutory actions, in the nature of common law quo warranto, are proceedings entailing **extraordinary remedies.**

Caldwell vs. Teany, et al, 157 N.E. 51, 51 C. J. Sec. 6, P. 311.

Being an extraordinary proceeding, the remedy sought is addressed to the sound discretion of the Court in which the action is filed. The Court, in its discretion, may withhold relief or decline to proceed to judgement, and it may exercise this discretion by dismissing the proceeding and rendering judgement in favor of the Defendants upon the case made by the pleadings where judgement of ouster would not be in public interest or serve any good end or purpose.

The following cases illustrate the application of this rule:

State ex rel Beck, Attorney General vs Board of County Commissioners of Allen County - 57 P. 2, 450,

was a Quo Warranto proceeding against the board because of alleged illegality of an election for failure of notice. The Court said:

> "While we cannot approve the lack of official notice for the election there is presented to the Court a very vital and practical question of public interest. . . . . Under all the circumstances, would the ouster of the commissioners from the exercise of such de facto powers serve any good end or purpose. This is an original action Quo Warranto. The question is in a large measure addressed to the sound discretion of the Court."
>
> "This Court has recognized the principle that the judicial discretion which controls the action is broad enough to determine whether under all the circumstances the relief shall be granted."
>
> "The Court, while having authority to render a judgement of ouster, is not compelled to do so; there being nothing to indicate that the condition or welfare of the district could be aided thereby."
>
> "Even although there be departures from legal limitations and standards, **ouster does not mechanically follow.** The Court may take a broad view of motives, conduct, situations, and cir-

> cumstances, and of the ultimate consequence of application of the remedy, whether useless, beneficial or harmful."

In Gas Service Co. vs Consolidated Gas Uitilities Corp., and City of Wichita, Intervenor, 65 P. 2, 584 at 593, we find the following:

> "An action in Quo Warranto is addressed to the sound discretion of the Court as to whether the particular relief prayed for should be granted. In consideration of such a question, the Court considers all the surrounding facts and cicumstances. **The relief prayed for is not always granted even though the questions of law upon which the relief prayed for depends are decided in favor of plaintiff."**

The Court then held certain actions of the City of Wichita invalid, but denied writ of ouster .

Another case adopting the same liberal view is: State ex rel Baird vs. Board of Commissioners of Wyandotte County 230 P. 531. There the Court reasoned:

> "Whether or not an action shall be commenced rests with the officer or persons authorized to sue....."
>
> "When an action has been commenced, and the cause of action is before the Court for adjudication, the Court has discretion to

grant or withhold relief, and this be true whether the action be prosecuted in the name of a private person. In this respect the State comes into Court on equal terms with its citizens".

"Even though there be departures from legal limitations and standards ousters do not mechanically follow. The Court may take a broad view of the motives, conduct, situations, and circumstances and the ultimate consequences of application of the remedy, whether useless, beneficial, or harmful".

The case of: Attorney General et al vs McDonald - 129 N.W. 1056, 32LRA (NS) 835, adopts the rule in the following language:

"In the case of an alleged intrusion into office, the Court has discretion to proceed to judgement of ouster or not, as the public interest require, and judgement will not be rendered where no good end will be subserved by it".

Citing: Lamoraux vs Ellis 89 Mich. 146, 50 NW 812.

The Court in: Attorney General ex rel vs. City of Methuen - 129 N.E. 662, 667, spoke as follows:

"The further question now arises whether the writ ought to issue under the circumstances

here disclosed, notwithstanding the violation of the constitution in the enactment of the City Charter. It was said in Stoughton vs. Baker 4 Mass. 232, 3 Am. Dec. 236:

No laches can be imputed to the government and against it no time runs so as to bar its rights.

"There is, however, another principle to be be considered in this connection. **The granting of relief by Quo Warranto, even when sought at the instance of the Attorney General in behalf of the public, is not a matter of absolute right but is a subject for the exercise of sound judicial discretion.** It is the duty of the Court to consider all the conditions, including immediate and remote consequences and to determine with a broad vision of the public weal whether on the whole the common interests demand the issuance of this extraordinary remedy".

See also:

State vs. Bowden, 101 P. 654.

People ex rel Zimmerman et al vs. Jones et al 139 N.E. 403.

People ex rel Prather et al vs. Miller et al, 163 N.E. 139.

People ex rel Talbot et al vs. Brinkley et al, 152 N.E. 585.

Lamoreaux vs. Ellis, 89 Mich. 146, 50 N.W. 812.

CONCLUSION

Since this a satutory proceeding in the nature of a common law Quo Warranto, Appellees contend that the Honorable Judge Kehoe, by dismissing this action, did not abuse the discretion reposed in his office. That there is a question regarding the validity of Ordinance No. 51 even the Appellant ought to concede, and whether that ordinance be held constitutional or invalid is not the sole factor determining the validity of the April 1st election. The relief sought by the Government is still subject to the discretion of the Court which, in this case, was exercised in favor of the Appellees and this Court ought not to set aside the judgement of the District Court upon the sole question of the illegality of the 653 voters, there being no allegations of fraud, or other corrupt practices. The election ought to be allowed to stand in public interest, and even if Ordinance No. 51 be sustained, the judgement of the District Court should be affirmed.

Respectfully submitted,
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